



DYHRBERG DRAYTON
EMPLOYMENT LAW

What's New Update November 2016

Holiday Reminders

With the holiday season fast approaching, here are a few reminders about issues that can arise at this time of year, including:

- Closedown periods;
- Calculating holiday pay;
- Public holidays & Trading Restrictions;
- Pre-Christmas finishers; and
- Christmas Parties.

Annual Closedown Period

When an employer closes down its operations (either partially or fully) over the Christmas/New Year period, requiring employees to use annual leave, it is known as a 'closedown period'.

To initiate a closedown period an employer must give each employee at least 14 days' notice of the requirement to either:

- take annual leave (if the employee has annual leave entitlement); or
- discontinue work (if the employee does not have any/enough annual leave entitlement).

E.g. if an employer intends to close down from 23 December (the Friday before Christmas), it must give employees notice by 8 December.

If an employee does not have enough entitlement to cover the whole period of the closedown, the employer and employee may agree to the employee taking leave in advance of entitlement.

If there is no agreement to the employee taking leave in advance, the employer must pay the employee 8% of their gross earnings since their last entitlement date (or the commencement of their employment, if they have been employed for less than 12 months), less any leave taken in advance. This will reset the employee's entitlement date to the first day of the close down.

Calculating Holiday Pay

The calculation of holiday pay for employees will vary based on individual circumstances.

Standard calculation

Employees who have completed 12 months' service have a minimum entitlement to paid leave of 4 weeks. The amount paid for a period of leave must be calculated at the greater of:

- The employee's ordinary weekly pay; or
- The employee's average weekly earnings for the 12 months immediately before the leave is taken.

These calculations will not vary greatly for employees in roles with fixed salary payments working standard hours each week.

Employers need to ensure they consider any variation to an employee's pay when calculating holiday pay. Common variations include:

- Employees working overtime;
- Employees receiving incentive based payments (such as commission);
- Employees receiving allowances; and
- Employees taking unpaid leave.

Changes in an employee's standard hours or pay

The calculation does not change when an employee's standard hours or pay change, but it is important employers understand their obligations when this occurs, for example:

- **Reduction in hours:** Employee A worked full-time until September this year. Since then, he has worked part-time. The employee takes leave in December. His average weekly earnings for the past 12 months includes pay from when he worked full-time, meaning it is greater than his new ordinary weekly pay. This results in the leave payment being more than what the employee would have received had they been at work that week.



- **Increase in pay:** Employee B was paid an annual salary of \$50,000 up until September, when it increased to \$60,000. The employee takes leave in January. The ordinary weekly pay would be higher than the average weekly pay, meaning the employee would be paid holiday pay at the higher rate of pay when on leave, despite accruing most of the leave at the lower rate of pay.

Parental leave impacts

Any leave an employee becomes entitled to during the following periods is not calculated in the same way as ordinary annual holidays (unless an employee's employment agreement specifies otherwise):

- A period of parental leave (including primary carer, partner's and extended leave);
- A period of preference in obtaining employment; or
- The 12-month period after an employee returns to work from parental leave.

Any leave an employee becomes entitled to during these periods should be ear-marked and, instead of being calculated at the greater of ordinary weekly pay or average weekly earnings, only the average weekly earnings are used to calculate holiday pay (regardless of when the employee takes the leave).

Because parental leave is usually unpaid leave, the employee's average weekly earnings immediately after returning to work may be significantly lower than their ordinary weekly pay (potentially \$0 if the leave is taken immediately after a 12-month extended leave period).

NB: This does not impact on the calculation of any holiday pay the employee was entitled to prior to taking parental leave or becomes entitled to more than 12 months after they return to work.

Public Holidays & Trading Restrictions

This year, Christmas Day and New Year's Day both fall on a Sunday. For employees who work a Monday to Friday week, these public holidays will be transferred to the following Tuesday (the Mondays already being public holidays).

However, for other employees the situation is more complex.

Employees who normally work on Sundays

If an Employee normally works on Sundays, the public holiday will be observed on that day. This means an Employee who normally works on Sundays and:

- is not required to attend work on Christmas Day and/or New Year's Day, must be paid their normal day's pay as with any other public holiday falling on a working day.
- is required to attend work on Christmas Day and/or New Year's Day, must be paid time and a half for the hours worked, as well as given a day in lieu to be taken at a date to be agreed between the parties.

Employees who don't normally work on Sundays, but do normally work on Tuesdays

If an Employee does not normally work on Sundays, the holiday will transfer to the following Tuesday (even if they are asked to work on that particular Sunday). This means an Employee who doesn't normally work on Sundays, but does normally work on Tuesdays and:

- is not required to attend work on the Tuesday, must be paid their normal day's pay as with any other public holiday falling on a working day.
- is required to work on the Tuesday, must be paid time and a half for the hours they work, as well as given a day in lieu to be taken at a date to be agreed between the parties.

Employees who normally work on Sundays and on Tuesdays

An Employee is not entitled to 'double-dip' on the public holiday and can only receive the entitlement once. This means:

- For an Employee who normally works both Sundays and Tuesdays, the holiday is treated as falling on the Sunday and the rules above apply. Tuesday becomes a normal working day.

- For an Employee who normally works both Sundays and Tuesdays, but is not required to work on either day, the Employee must be paid their normal day's pay for the Sunday and the closedown period rules (discussed above) will apply for the Tuesday.

Employees who don't normally work on Sundays or on Tuesdays

If an Employee does not normally work on Sundays or Tuesdays, he/she is not entitled to any payment for Christmas Day or New Year's Day.

Trading Restrictions

Trading restrictions apply on the day the holiday actually falls. This year, this means shops without an exemption must be closed on Christmas Day itself, but can open on the following Tuesday.

Pre-Christmas Finishers

Section 40(1) of the Holidays Act 2003 provides:

A public holiday that occurs during an employee's annual holidays must be treated as a public holiday and not as part of the employee's annual holidays.

No surprises there (hopefully!).

However, section 40(3) also gives employees whose employment is terminating the right to be paid for a public holiday if it:

would have occurred during the employee's annual holidays had the employee taken his or her remaining annual holidays entitlement immediately after the date on which the employee's employment came to an end.

This only applies if the public holiday would have otherwise been a working day for the employee.

E.g. if an employee works full time Monday to Friday, the employee's last day of employment is Friday 23 December and they have 5 days of annual leave accrued, their employer must pay the employee for those 5 days plus 4 public holidays.

For this reason, it is important to check how much annual leave a finisher will have accrued by their last day and whether any public holidays will fall in the corresponding period after they finish work.

This is especially important when an employee has a high annual leave accrual and in the pre-Christmas/New Year period.

Christmas Parties

With the recent changes to health and safety law, it is more important than ever for employers to create a safe environment when hosting functions with alcohol involved, including staff Christmas parties. Make sure food is provided and a responsible manager monitors consumption and behaviour. Ensure people get home safely.

There is also the possibility that failing to create such an environment could render a decision based on an employee's behaviour at/after such a function unjustified.

In a case in Australia, an employee challenged his dismissal for sexually harassing colleagues at a Christmas Party. The Fair Work Commission found in his favour, in part because of the availability of free alcohol at the party. It found:

'...it is contradictory and self-defeating for an employer to require compliance with its usual standards of behaviour at a function but at the same time to allow the unlimited service of free alcohol at the function.

If alcohol is supplied in such a manner, it becomes entirely predictable that some individuals will consume an excessive amount and behave inappropriately...

It should have been obvious at the function itself that alcohol was not being served responsibly, given that from a certain point persons were able freely to help themselves to beer and that Mr Keenan at an early stage presented himself to a number of persons as intoxicated.'

Let's all be safe out there! Happy Holidays.